there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eyes of the law, a miscarriage of justice." Counsel conceded that although there was a misdirection yet the prosecution in this case has adduced all the evidence it had, so that the failure of justice occasioned by the trial President in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution (See *Mahadi* v. *Public Prosecutor*).[4]

It was the contention of the learned deputy that the President had not erred or misdirected himself on the burden of proof and that there has been no failure of justice. In all fairness to the learned President it must be said that he had taken the trouble to write a judgment covering nine pages, but it was difficult to reject the contention of learned counsel for the appellant that because of the two offending passages quoted above, the judgment read as a whole would suggest that the learned President had put a higher burden on the defence to show the defendant's version to be reasonable and probable.

It is important for trial magistrates and presidents to direct themselves correctly on the burden of proof. In this respect I think it would not be inappropriate to refer to the following passage in the judgment of the U.K. Court of Criminal Appeal in *R.* v. *Attfield* [5]although their Lordships' observations in that appeal were concerned with the necessity for a clear direction on the burden of proof in a trial by jury:-

"..... It is fair to say that over and over again appeals are brought to this court, or applications are made for leave to appeal based on alleged inadvertencies in direction as to the burden of proof, and this court finds itself in the position of having to apply, so to speak, two parallel principles. In the first place, the direction as to the burden of proof and as to the standard of proof is undoubtedly of cardinal importance. That is a point in favour of the appellant, and if the direction fails in that respect, then indeed the appeal is all the more cogent. On the other hand, there is a counterbalancing principle that this court has said that the words of a summing-up are not to be weighed in too nice scales provided that the substance of the summing-up presents to the jury the issue in a form in accordance with law. It is in the application of those two counterbalancing principles that this court fulfils its function."

Similarly, in applying those two parallel principles in fulfilling its function this court has to allow the appeal as the direction as to the burden of proof and to the standard of proof on the appellant was such that it has, in my judgment, occasioned a failure of justice. In the circumstances of this case and in fairness to both the prosecution and the appellant, there should be a re-trial before another President.

Re-trial ordered.

Solicitors: *Sri Ram, Zulkifly & Kumar.*

MAJA ANAK KUS v. PUBLIC PROSECUTOR

[A. Cr. J. (Tan Chiaw Thong J.) March 29, 1984]

[Miri – Criminal Appeal No. 1 of 1984]

Criminal Law and Procedure – Charge of offence under s. 324 Penal Code – Bailable offence – Whether accused can be authorised to be detained in police custody for further investigation – Criminal Procedure Code (F. M.S. Cap. 6), ss. 28, 117 & 383.

Penal code, s.324 – Voluntarily causing hurt by dangerous weapon – Detention of accused – Whether order rightly made.

In this case the appellant was arrested for an offence of voluntarily causing hurt by a dangerous weapon under section 324 of the Penal Code, a bailable offence. The learned Magistrate made an order authorising his detention in police custody for 14 days under the provisions of section 117 of the Criminal Procedure Code. The appellant appealed.

Held, dismissing the appeal: the learned Magistrate had exercised her discretion rightly in this case and had fully complied with the provisions of section 117 of the Criminal Procedure Code.

Case referred to:-

(1) *Reg.* v. *Lim Kwang Seng & Others* [1956] M.L.J. 178.

CRIMINAL APPEAL.

M.S. Sandhu for the appellant.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an appeal by the Appellant against the order of the lower Court authorising his detention in police custody for 14 days under the provisions of section 117 of the Criminal Procedure Code.

There are three grounds of appeal, as follow:-

(1) The learned magistrate erred in law in holding that "Section 387 does not confer on a person accused of

a bailable offence an unqualified and absolute right to be released on bail."

(2) The learned magistrate misconceived the law and ought to have held that in the case of a bailable offence, bail is a matter of right.

(3) The learned magistrate ought, in all the circumstances of the case, to have granted the Order prayed.

In his submission, learned counsel for the Appellant dealt with all three grounds of appeal together.

It was submitted that when a person is brought before a magistrate accused of a bailable offence, even under section 117, Criminal Procedure Code for further remand, he is entitled to bail as of right, provided he is able and willing to furnish bail; and section 117 comes into operation after the person is arrested under section 28 and investigation cannot be completed within 24 hours. It was emphasized that section 28 clearly stipulates that the arrest and detention is subject to the provisions in the Code as to bail. Although he is brought before a magistrate under section 117, his right to bail remains, and the magistrate is bound to grant him bail under section 387(i) if he is arrested for a bailable offence and is prepared to give bail.

Reference was made to the case of *Reg.* v. *Lim Kwang Seng & Others* [1] which turned on the construction of certain sections of the Singapore Criminal Procedure Code. I do not propose to dwell at any length on this case except to express the view, with respect, that it is of no persuasive authority here, since there would appear to be no provisions in the Singapore Criminal Procedure Code corresponding to those in our section 117 (see *S. Chandra Mohan's* Bail in Singapore (1977). At page 95 of that publication, it is stated that

"It is, however, important to remember that the Indian and Malaysian Codes contain a special provision for police custody for a period not exceeding 15 days if the investigations cannot be completed within twenty-four hours of arrest, provided there are grounds for believing that the accusation is well-founded. The magistrate authorising such detention must record his reasons for so doing."

Here, the record of proceedings of the lower Court (at Page 1) shows that the request for detention under section 117 was made on 3 grounds, namely,

(1) Identification parade yet to be held

(2) Weapon used yet to be recovered

(3) Investigation still incomplete

The Appellant was arrested for an offence of voluntarily causing hurt by a dangerous weapon under section 324, Penal Code, a bailable offence. The following passage appears at Page 4 of the copy of the lower Court proceedings in the ruling of the learned magistrate:

"This court, having heard the P.O. and having looked at the investigation diary came to the conclusion that the suspect may be involved in the offence alleged to have been committed and since police investigation cannot be completed within 24 hours, ordered that the suspect be remanded in police custody for 14 days."

It seems clear that, in authorising the detention of the Appellant, the learned magistrate had recorded her reasons for so doing, in compliance with section 117(iii). There is no evidence that the learned magistrate had exercised her discretion wrongly. In my judgment, ground 3 of the Appeal is without any merit.

The other two grounds are concerned with the scope of sections 28, 117 and 387 of the Criminal Procedure Code. Considering these sections together, it seems clear that after a person is arrested without warrant, the police, in the absence of a special order of a magistrate, are not authorised to detain the person arrested in custody beyond 24 hours. If the police are unable to complete investigation within that period, and, as here, the offence concerned is a bailable offence, the person arrested must be given bail, if he is prepared to furnish bail (section 387(i)), if the provisions of section 117 are not invoked. On the other hand, if the police, after 24 hours of the arrest, resort to the special provisions of section 117, the magistrate before whom the person arrested is brought may, if deemed appropriate, authorise detention for a term not exceeding 15 days (section 117(ii), after complying with section 117(iii)). In my view, that was what the lower Court had done here. Section 167 of the Indian Code of Criminal Procedure, 1975, is *in pari materia* with our section 117, with certain differences which are not material for the purposes of this appeal. Section 57 of the Indian Code is also *in pari materia* with our section 28. Dealing with the scope of the Indian section 167, the following passage appears at item 3 at Page 1361 of Volume 4 of *Sohoni's* Code of Criminal Procedure (17th Edition):

"Reading Sections 57 and 167 together, it is clear that the Legislature contemplates that the investigation should be completed in the first instance within 24 hours under Section 57, or if not, under Section 167 within 15 days from the date when the person arrested was first produced before the Magistrate. This is in accordance with the

principle of Anglo-Saxon Criminal Law, on which Indian Law is based ..... This section comes into operation only if the investigation cannot be completed within the period of twenty-four hours fixed by section 57 (our section 28), and if the Magistrate authorises detention in the custody of the police, he is enjoined to record his reasons for so doing....."

It seems clear, therefore, that the lower Court had fully complied with the provisions of section 117. The arguments of learned counsel for the Appellant may be considered to be valid only if section 387(i) is so construed as to override section 117 and in this respect, it is my view that the Legislature does not legislate in vain, a situation which in my opinion would arise if section 117 is rendered nugatory and without legal effect by section 387(i).

For the reasons given, grounds (1) and (2) of the Appeal fail.

The appeal is dismissed.

Appeal dismissed.

Solicitor: *M.S. Sandhu & Co.*

DUNLOP MALAYSIAN INDUSTRIES BHD. v. PUBLIC PROSECUTOR

[A. Cr. J. (Peh Swee Chin J.) May 31, 1984]

[Seremban – Criminal Appeal No 67 of 1983]

Criminal Law and Procedure – Corporation found guilty of pollution offence – Fine imposed – Sentence of one day imprisonment imposed on factory manager – Appeal – Purposive approach in interpretation – Subordinate Courts Act, 1948, s. 99A & 3rd Schedule para. 20.

Company Law – Corporation found guilty of pollution offence – Factory manager sentenced to imprisonment of one day – Misapplication of law by magistrate.

In this case the appellant, a corporation had pleaded guilty to a pollution offence and had been convicted and fined $10,000-00. The learned Magistrate further sentenced to one day's imprisonment the factory manager, who represented the appellant at the hearing. An appeal was lodged against this order of one day's imprisonment. The learned Magistrate purported to act under section 99A of the Subordinate Courts Act, 1948 and paragraph 20 of the Third Schedule thereto.

Held, the powers set out in the Third Schedule of the Subordinate Courts Act, 1948, can be exercised only in the manner prescribed by a written law. The learned Magistrate had misapplied the law and the appeal must be allowed and the sentence of one day's imprisonment set aside.

Case referred to:

(1) *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.* [1971] A.C. 850, 880.

CRIMINAL APPEAL.

Vinayak P Pradhan for the appellants.

Mohamed Zaki bin Mohamad Yasin (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Peh Swee Chin J.: This appeal involves a pollution offence under section 25(1) of the Environmental Quality Act, 1974 in which the sole defendant, a corporation registered under the Companies Act, 1965, was fined $10,000/- on its plea of guilty. The matter did not end there, for the learned Magistrate further sentenced to one (1) day's imprisonment, one Zubir bin Abdul Rauf (the factory manager of the defendant/corporation), who represented the defendant at the hearing and against this order of one day's imprisonment an appeal was lodged.

The order appealed from appears to have been so highly irregular that it was not surprising that learned counsel for the appellant, in his submission, took the Court through the rules of natural justice and the articles of the Federal Constitution dealing with the fundamental liberty of a person.

The learned Magistrate however relied, for this remarkable state of affairs, on para. 20 of the Third Schedule referred to in section 99A of the Subordinate Courts Act, 1948.

Section 99A reads as follows:-

"99A. In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every Sessions Court and Magistrates Court shall have the further powers and jurisdiction set out in the Third Schedule."

Para. 20 of the Third Schedule reads as follows:-

"20. Power, where any corporation is guilty of any act or omission which, if it were an individual, would render it liable to arrest or commitment, to order the arrest of or commit any officer of the corporation who caused or wilfully permitted or contributed to the act or omission, and also to fine the corporation."

Read literally, para. 20 may indeed mean the way it had meant to the learned Magistrate. Such literal reading would however, in the circumstances of the case, lead to a result totally unjust and